

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Forfeiture Methodology for Violations)	EB Docket No. 16-330
of Rules Governing Payment to Certain)	
Federal Programs)	
)	

**COMMENTS OF
ITTA – THE VOICE OF MID-SIZE COMMUNICATIONS COMPANIES**

ITTA – The Voice of Mid-Size Communications Companies (ITTA) hereby submits its comments in support of the Petition for Reconsideration¹ of the Commission’s Policy Statement in the above-captioned proceeding.²

I. BACKGROUND

There is a famous saying that those who cannot remember the past are condemned to repeat it. A generation ago, without first having issued a notice nor solicited public comment, the Commission adopted a “policy statement” establishing standards for assessing forfeitures under Section 503(b) of the Communications Act of 1934, as amended (Act).³ As a result of these procedural failings, the Court of Appeals for the D.C. Circuit set aside the 1991 policy statement,⁴ forcing the Commission to adopt a revised version through a notice and comment

¹ Petition for Reconsideration, EB Docket No. 16-330 (filed Mar. 6, 2015); *see* Federal Communications Commission, Petition for Reconsideration of a Policy Statement, 81 Fed. Reg. 74431 (Oct. 26, 2016) (Petition for Reconsideration).

² *Forfeiture Methodology for Violations of Rules Governing Payment to Certain Federal Programs*, Policy Statement, 30 FCC Rcd 1622 (2015) (*Policy Statement*).

³ *See Standards for Assessing Forfeitures*, Policy Statement, 6 FCC Rcd 4695 (1991), *recon. denied* 7 FCC Rcd 5339 (1992), *revised* 8 FCC Rcd 6215 (1993); 47 U.S.C. § 503(b).

⁴ *United States Telephone Ass’n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994) (*USTelecom*).

rulemaking proceeding.⁵ Fast-forward nearly a quarter-century, and the Commission has again adopted, without notice and comment, a policy statement reevaluating its methodologies for calculating forfeitures, in this case for violations of federal program payment rules.

For the same reasons, the 2015 *Policy Statement* must be set aside. The Petition for Reconsideration makes two additional arguments why this is the case, namely, that the new methodology is arbitrary and capricious in contravention of the Administrative Procedure Act (APA), and that treating the subject violations as “continuing violations” conflicts with the statute of limitations for enforcement actions under Section 503 of the Act. As explained below, ITTA concurs with these arguments. If the Commission wishes to consider changes to its forfeiture methodologies along the lines of what it adopted in the *Policy Statement*, it must pursue such changes via a notice and comment rulemaking proceeding.

II. DISCUSSION

On February 3, 2015, the Commission released the *Policy Statement*, adopting a treble damages methodology for violations of federal program payment rules. The new methodology is intended to apply when telecommunications service providers fail to pay federal regulatory fees or make timely contributions to the Universal Service Fund (USF), Telecommunications Relay Service (TRS) Fund, and the cost recovery mechanisms for local number portability (LNP) and the North American Numbering Plan (NANP). Under this approach, each violator’s apparent base forfeiture liability will be three times its debts to the USF, TRS, LNP, NANP, and regulatory fee programs.⁶ The Commission took this action because, in its view, the prior methodologies were unduly cumbersome, preventing the Commission from resolving

⁵ See *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order in CI Docket No. 95-6, 12 FCC Rcd 17987 (1997) (*1997 Forfeiture Policy Statement*).

⁶ *Policy Statement*, 30 FCC Rcd at 1623-24, para. 6.

investigations quickly and efficiently which in effect constrained the Commission's ability to deter non-compliance.⁷ Citing a 2006 Commission forfeiture order, the Commission asserted that "each single failure to pay a federal program assessment constitutes a separate violation that continues until the assessment is fully paid."⁸

The Petition for Reconsideration first argues that the *Policy Statement* violates the notice and comment requirements of the APA. Regardless of the Commission labeling it as a "policy statement," as Petitioners correctly note, "the question of whether a given agency action is a substantive rule change subject to notice and comment or an exempt policy statement turns on whether the agency intends to bind itself to a particular legal position."⁹ Petitioners then cite myriad precedent, including *USTelecom*, for the guideline that a policy statement, unlike a substantive rule, must genuinely leave the agency free to exercise discretion.¹⁰ In *USTelecom*, the D.C. Circuit observed that the policy statement "set forth 'a detailed schedule of penalties applicable to specific infractions,'" and "found it 'rather hard to imagine an agency wishing to publish such an exhaustive framework for sanctions if it did not intend to use that framework to cabin its discretion.'"¹¹ ITTA agrees with Petitioners that the same rationale underlying *USTelecom* applies to this case.

Moreover, as Petitioners contend, in the *Policy Statement* the Commission does not offer even a pretense that the new forfeitures methodology is discretionary and not intended to be binding.¹² ITTA adds that citing generally to a sweeping public notice seeking comment on

⁷ See *id.* at 1622, para. 2.

⁸ *Id.* at 1624, para. 7.

⁹ Petition for Reconsideration at 3.

¹⁰ See *id.*

¹¹ *Id.* at 5 (quoting *USTelecom*, 28 F.3d at 1234).

¹² See *id.* at 6.

process reform, released on delegated authority,¹³ does not constitute the notice and comment procedure required by Section 553 of the APA.¹⁴ Neither does citing to a 2006 forfeiture order warning carriers of more drastic actions the Commission could take in the event of non-compliance with the Commission's USF and TRS Fund contribution rules¹⁵ – which itself, as an enforcement action against one particular carrier, did not emanate from a notice and comment rulemaking process.

Next, the Petition for Reconsideration asserts that the treble damages methodology enunciated in the *Policy Statement* is arbitrary and capricious. ITTA agrees. Section 503(b)(2)(E) of the Act provides that in determining the amount of a forfeiture penalty, the Commission must “take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.” As Petitioners charge, in the *Policy Statement* the Commission abandons this statutory obligation in favor of treating all violations subject to the new methodology alike, because the Commission finds the process required by the Act “cumbersome” and inefficient.¹⁶ Petitioners also adroitly observe that, in contrast to the *1997 Forfeiture Policy Statement*, where the Commission specifically retained discretion to depart from the guidelines,¹⁷ there is no similar expression of Commission flexibility in the *Policy Statement*, nor willingness to depart from the new base amount where,

¹³ See *Policy Statement*, 30 FCC Rcd at 1622, para. 2 n.1 (citing generally *FCC Seeks Comment on Report on Process Reform*, Public Notice, 29 FCC Rcd 1338 (OCHTW 2014))

¹⁴ 47 U.S.C. § 553.

¹⁵ *Policy Statement*, 30 FCC Rcd at 1623, para. 5 (citing *Globcom, Inc.*, Order of Forfeiture, 21 FCC Rcd 4710, 4723-24, paras. 35-38 (2006) (*Globcom Forfeiture Order*)).

¹⁶ See Petition for Reconsideration at 8.

¹⁷ *Id.* at 9 (quoting *1997 Forfeiture Policy Statement*, 12 FCC Rcd at 17099, para. 22).

for instance, the non-contributor made a legitimate mistake or reasonably interpreted ambiguous law differently from the Commission.¹⁸

Finally, ITTA concurs with Petitioners' position that treating payment and reporting violations as "continuing violations" conflicts with the statute of limitations in Section 503 of the Act. As Petitioners argue, the failure to file data or to make a payment by a date certain is a single, discrete violation, a one-time event.¹⁹ Contorting the one-year statute of limitations period by treating such a one-time event as a continuing violation "would effectively nullify section 503(b)(6), subjecting telecommunications service providers to liability in perpetuity."²⁰ As Commissioner Pai recently propounded in an analogous context where the Commission expansively construed continuing violations, "[t]his legal theory cannot be right."²¹

¹⁸ *See id.*

¹⁹ *See id.* at 12.

²⁰ *Id.* at 15.

²¹ *Network Services Solutions, LLC, Scott Madison*, File No.: EB-IHD-15-0001913, Notice of Apparent Liability for Forfeiture and Order, FCC 16-158, Statement of Commissioner Ajit Pai, Approving in Part and Dissenting in Part (Nov. 4, 2016) (proposed forfeiture for conduct at least 127 days beyond statute of limitations based upon apparent violation deemed continuing as a result of failure to take remedial action).

III. CONCLUSION

For the foregoing reasons, the Commission should grant the Petition for Reconsideration and vacate the *Policy Statement*.

Respectfully submitted,

By: /s/ Michael J. Jacobs

Genevieve Morelli
Michael J. Jacobs
ITTA
1101 Vermont Ave., NW, Suite 501
Washington, DC 20005
(202) 898-1520
gmorelli@itta.us
mjacobs@itta.us

November 9, 2016